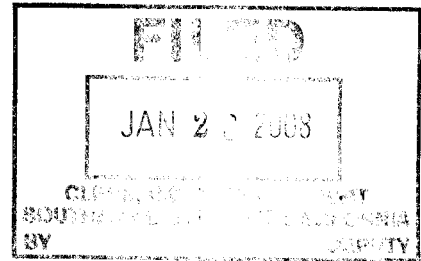


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE MARIA CHAVEZ-CUEVAS,,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Cr. No. 07-0790GT
Cv. No. 07-2311GT

ORDER

On December 7, 2007, Petitioner, Jose Maria Chavez-Cuevas ("Mr. Chavez"), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Chavez requests a two level downward departure based on his status as a deportable alien, which Mr. Chavez asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Chavez's brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Chavez's Motion to Modify Sentence is **DENIED.**

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1 First, Mr. Chavez pled guilty, pursuant to a written plea agreement, to two counts of illegal
 2 entry by an alien, in violation of 8 U.S.C. § 1325. In the written plea agreement, Mr. Chavez
 3 explicitly waived his right to appeal and/or collaterally attack his conviction or sentence. The
 4 Ninth Circuit has long acknowledged that the terms of a plea agreement are enforceable. *See*,
 5 United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1282 (1997).
 6 Since Mr. Chavez expressly waived his statutory right to appeal or collaterally attack his sentence
 7 in his plea agreement, Mr. Chavez is now precluded from challenging that sentence pursuant to
 8 28 U.S.C. § 2255. *See*, United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) (holding that
 9 a knowing and voluntary waiver of a statutory right is enforceable).

10 Moreover, even if Mr. Chavez had not expressly waived his right to appeal or collaterally
 11 attack his sentence, his petition would still fail. In essence, Mr. Chavez argues that because of
 12 his status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security
 13 confinement." Mr. Chavez argues that the Court should grant him a two level downward
 14 departure because of his status. However, Mr. Chavez's argument that the Court should depart
 15 downward because he is a deportable alien is precluded by statute and current Ninth Circuit
 16 case law. By statute, the Court may depart downward only if there are "aggravating or
 17 mitigating circumstances . . . not adequately taken into consideration by the Sentencing
 18 Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of
 19 deportation is not a factor that the district court may consider for sentencing purposes. United
 20 States v. Alvarez-Cardenas, 902 F.2d 734, 737 (9th Cir. 1990).¹ Accordingly,

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 26 ¹ The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Mr. Chavez,
 27 was not entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as
 28 a deportable alien he is not eligible to spend the last six months of his sentence in a half way
 house pursuant to 18 U.S.C. § 3624(c). *See* United States v. Zepeda-Valles, 87 F.3d 1325 (9th
 Cir. 1996).

1 **IT IS ORDERED** that Mr. Chavez's Motion to Modify Sentence is **DENIED**.

2 **IT IS SO ORDERED.**

3
4 1-25-08
5 date

6 
7 GORDON THOMPSON, JR.
8 United States District Judge

9 cc: AUSA Bruce Castetter
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